## MRCB BUILDERS SDN BHD v. LIANG UNITED ENGINEERING STUDIO

HIGH COURT MALAYA, SHAH ALAM
WONG KIAN KHEONG J
[CIVIL SUIT NO: BA-22C-18-05-2021]
13 DECEMBER 2022

**Abstract** – *A sub-contractor of a project owes contractual duties and a duty of care to the main contractor. However, as there is no contract between the main contractor and the sub-contractor's consultant, the latter does not owe any contractual duty to the former for the reason that there is no sufficient legal proximity. It is not in the public interest for a main contractor to commence a suit against the sub-contractor's consultant when the main contractor can institute a suit or arbitration against the sub-contractor regarding breaches of the sub-contractor's duties.*

***TORT:*** *Negligence – Professional negligence – Duty of care – Main contractor appointed sub-contractor to complete certain works – Sub-contractor appointed consultant to complete works – Damages occurred to works – Main contractor commenced suit for professional negligence against sub-contractor's consultant – Whether suit ought to be allowed – Whether sub-contractor's consultant owed duty of care to main contractor – Whether there was sufficient legal proximity between main contractor and sub-contractor*

***CIVIL PROCEDURE:*** *Striking out – Application for – Claim for damages – Professional negligence – Main contractor appointed sub-contractor to complete certain works – Sub-contractor appointed consultant to complete works – Damages occurred to works – Main contractor commenced suit for professional negligence against sub-contractor's consultant – Whether sub-contractor's consultant owed duty of care to main contractor – Whether suit ought to be struck out – Rules of Court 2012, O. 18 r. 19(1)(a), (b) & (d)*

PJ Sentral Development Sdn Bhd, the developer, had appointed the plaintiff as the main contractor for a project. The plaintiff, in turn, appointed Biaxis (M) Sdn Bhd ('Biaxis') to design, execute and complete contiguous bored pile walls ('CBP walls') ('plaintiff-Biaxis contract'). Clauses 7.1 and 16.1 of the plaintiff-Biaxis contract provided Biaxis to indemnify the plaintiff with regard to, *inter alia*, any loss and damage which may arise in respect of the CBP walls. Biaxis had issued a work order to the defendant with regard to the provision of the defendant's design of CBP walls. The plaintiff accepted the defendant's designs of the CBP walls and subsequently, Biaxis commenced construction works regarding the CBP walls. However, while

Biaxis was performing the works, damages occurred to the CBP walls, neighbouring buildings and the underground cables belonging to Telekom Malaysia Bhd. In accordance with the arbitration clause contained in the plaintiff-Biaxis contract, the plaintiff commenced arbitral proceedings against Biaxis for the recovery of damages. The plaintiff also filed the present suit against the defendant for the recovery of damages. The defendant, on the other hand, applied to strike out and dismiss the suit, pursuant to O. 18 r. 19(1)(a), (b) and (d) of the Rules of Court 2012 ('ROC'). The issues that arose for determination were: (i) whether the plaintiff, the main contractor who had appointed the defendant, a sub-contractor, could file a suit for professional negligence against the defendant, who had been appointed by Biaxis; (ii) whether the defendant owed a duty of care to the plaintiff regarding the defendant's CBP walls' designs; and (iii) if the duty of care above did not exist, whether the suit ought to be struck out or dismissed.

**Held (striking out suit with costs):**

**(1)** The defendant did not owe a duty of care with regard to the defendant's CBP walls' designs and the damages to the CBP walls. There was no sufficient legal proximity between the plaintiff, as the main contractor, and the defendant, because (i) it was not reasonably foreseeable that the plaintiff would suffer the damages to the CBP walls due to the defendant's designs to the CBP walls. On the contrary, it was reasonably foreseeable that the damages to the CBP walls would befall the plaintiff due to the negligence on the part of Biaxis who was appointed by the plaintiff to design, execute and complete the CBP walls; (ii) the defendant had not voluntarily assumed any responsibility to the plaintiff; (iii) with regard to the design, execution and completion of the CBP walls, the plaintiff had relied on Biaxis and not the defendant; and (iv) there was no physical, circumstantial and causal proximity between the plaintiff and the defendant in respect of the design, execution and completion of the CBP walls. Instead, there was physical, circumstantial and causal proximity between the plaintiff and Biaxis regarding the design, execution and completion of the CBP walls. The decision above did not cause any injustice to the plaintiff because the plaintiff may recover damages for the damages to the CBP walls from Biaxis in the arbitration between the plaintiff and Biaxis. (paras 31 & 32)

**(2)** It was plain and obvious that the suit was frivolous and/or vexatious and/or constituted an abuse of court process. If the court is satisfied regarding the application of any one of the sub-paras in O. 18 r. 19(1)(a) to (d) of the ROC, the court should only strike out, and not dismiss an action/counterclaim/originating summons. This is because, applications pursuant to O. 18 rr. 19(1) and (3) of the ROC are decided summarily by the court based solely on whether any one of the

sub-paras. in O. 18 r. 19(1)(a) to (d) of the ROC had been fulfilled by the applicants. An action/counterclaim/originating summons should only be dismissed if the court has heard all the evidence which had been adduced by the parties in the action/counterclaim/originating summons and a dismissal of action/counterclaim/originating summons is therefore justified by the evidence in question. The suit was struck out with costs. (paras 34, 36 & 37)

**Case(s) referred to:**

*Corsa Tech Sdn Bhd v. YTB Impression Sdn Bhd & Ors [2021] 1 LNS 2345 HC* ***(refd)***

*De Tebrau Makmur Sdn Bhd & Anor v. Bank Kerjasama Rakyat Malaysia Bhd [2017] 1 LNS 252 HC* ***(refd)***

*Koh Tat Haur & Anor v. Brecon Synergy Sdn Bhd [2022] 1 LNS 2648 HC* ***(refd)***

*Lok Kok Beng & Anor v. Loh Chiak Eong & Anor [2015] 7 CLJ 1008 FC* ***(refd)***

*Motordata Research Consortium Sdn Bhd v. Ahmad Shahril Abdullah & Ors [2017] 1 LNS 1142 HC* ***(refd)***

*Novaviro Technology Sdn Bhd v. QL Plantation Sdn Bhd & Anor; Watermech Engineering Sdn Bhd (Third Party) [2018] 7 CLJ 119 HC* ***(refd)***

*Rolls-Royce New Zealand Ltd v. Carter Holt Harvey Ltd [2005] 1 NZLR 324* ***(refd)***

*Simaan General Contracting Co v. Pilkington Ltd (No 2) [1988] 1 QB 75* ***(refd)***

*Technointan Holding Sdn Bhd v. Tetuan Tan Kim Siong & Teh Hong Jet [2006] 7 CLJ 541 HC* ***(refd)***

*Tuan Hj Ishak Ismail v. Leong Hup Holdings Bhd & Other Appeals [1997] 1 CLJ 463 CA* ***(refd)***

*Yap Chee Keong Holdings Sdn Bhd v. Cosmopolitan Avenue Sdn Bhd [2022] 3 CLJ 764 HC* ***(refd)***

**Legislation referred to:**

Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c), (d), (2), (3), O. 92 r. 4

*For the plaintiff - Lam Ko Luen & Hamsavartheni Sivalingam; M/s Shook Lin & Bok*
*For the defendant - Alicia Ng Yan Ying & Shasha Chin Sim Cheng; M/s Gananathan Loh*

*Reported by Najib Tamby*

**JUDGMENT**
(Encl. No. 9)

**Wong Kian Kheong J:**

**Novel Issues**

**[1]** This judgment discusses the following two novel questions:

(i) whether the plaintiff's company (plaintiff), the main contractor of a construction project (project) who has appointed a sub-contractor, Biaxis (M) Sdn Bhd (Biaxis), to design, execute and complete contiguous bored pile walls in the project (CBP Walls), can file a suit for professional negligence against the defendant (defendant) who has been appointed by Biaxis to provide designs of CBP Walls (defendant's designs (CBP

A Walls)). This issue concerns whether the defendant owed a duty of care to the plaintiff regarding the defendant's designs (CBP Walls) (alleged duty of care (CBP Walls)); and

(ii) if the court decides that the alleged duty of care (CBP Walls) did not exist, should the court exercise its discretion under O. 18 r. 19(1) of the B Rules of Court 2012 (RC) to dismiss or strike out this suit?

**Salient Facts**

**[2]** PJ Sentral Development Sdn Bhd (developer) was the developer of the project and had appointed the plaintiff as the project's main contractor and C "superintending officer" (SO).

**[3]** Minconsult Sdn Bhd (Minconsult) had been appointed by the Developer to be the Civil and Structural Engineering consultant for the project.

D **[4]** By way of a "letter of award" dated 22 September 2014 (contract (plaintiff-Biaxis)), the plaintiff appointed Biaxis to design, execute and complete CBP Walls.

**[5]** Clauses 7.1 and 16.1 of the contract (plaintiff-Biaxis) have provided for Biaxis to indemnify the plaintiff with regard to, among others, any loss E and damage which may arise in respect of CBP Walls (indemnity provisions (plaintiff-Biaxis)).

**[6]** The defendant is a sole proprietorship which provides, among others, engineering consultancy services.

F **[7]** Biaxis had issued a "work order" dated 1 October 2015 to the defendant with regard to the provision of the defendant's designs (CBP Walls) to Biaxis (contract (Biaxis-defendant)).

**[8]** Pursuant to the contract (Biaxis-defendant), based on information provided by Biaxis, plaintiff and Minconsult, defendant's designs (CBP G Walls) were provided to Biaxis.

**[9]** The plaintiff had accepted the defendant's designs (CBP Walls) in October 2014. Hence, Biaxis commenced construction works regarding CBP Walls (works).

H **[10]** While Biaxis was performing the works around June 2015, the following damage occurred regarding CBP Walls (damage (CBP Walls)):

(i) there were movements in "Type 1", "Type 1A" and "Type 5" CBP walls;

(ii) there were cracks in neighbouring buildings; and

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(iii) damage was caused to underground cables belonging to Telekom Malaysia Bhd.

**[11]** In accordance with the arbitration agreement between the plaintiff and Biaxis in the contract (plaintiff-Biaxis), the plaintiff commenced arbitral proceedings against Biaxis to recover damages in respect of the damage (CBP Walls) (arbitration (plaintiff-Biaxis)).

**Legal Proceedings**

**[12]** The plaintiff filed this action against the defendant to recover damages for the damage (CBP Walls) (this suit). According to the statement of claim filed in this suit (SOC), among others:

(i) the alleged duty of care (CBP Walls) existed; and

(ii) the defendant had breached the alleged duty of care (CBP Walls) and this breach had caused the damage (CBP Walls).

**[13]** In court enclosure no. 9 (encl. 9), the defendant has applied to court to strike out and dismiss this suit on the following grounds:

(i) no reasonable cause of action is disclosed in this suit within the meaning of O. 18 r. 19(1)(a) RC (sub-para. (1)(a));

(ii) this suit is scandalous, frivolous or vexatious under O. 18 r. 19(1)(b) RC (sub-para. (1)(b)); and

(iii) this suit constitutes an abuse of court process pursuant to O. 18 r. 19(1)(d) RC (sub-para. (1)(d)) and/or the court's inherent jurisdiction.

**[14]** In addition to the novel issues stated in the above para. 1, this court will also decide on the following questions in encl. 9:

(i) can the court simultaneously strike out and dismiss this suit under O. 18 r. 19(1) RC?;

(ii) whether the plaintiff can rely on O. 92 r. 4 RC, the court's inherent "jurisdiction" and/or inherent "power" to support encl. 9 when the Rules Committee has expressly provided for all the grounds to strike out in O. 18 r. 19(1)(a) to (d) RC;

(iii) for the purpose of sub-para. (1)(a) and O. 18 r. 19(2) RC, does the SOC disclose a reasonable cause of action against the defendant?; and

(iv) whether this suit has scandalised the defendant as understood in sub-para. (1)(b).

**Can Court Simultaneously Dismiss And Strike Out This Suit?**

**[15]** Order 18 r. 19 RC provides as follows:

> *(1) The court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that:*

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*(a) it discloses no reasonable cause of action* or defence, as the case may be;

*(b) it is scandalous, frivolous or vexatious;*

(c) it may prejudice, embarrass or delay the fair trial of the action; or

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*(d) it is otherwise an abuse of the process of the Court,*

*and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.*

*(2) No evidence shall be admissible on an application under subparagraph (1)(a).*

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(3) This rule shall, as far as applicable, apply to an originating summons as if it were a pleading. (emphasis added)

**[16]** I have decided as follows in *Yap Chee Keong Holdings Sdn Bhd v. Cosmopolitan Avenue Sdn Bhd* [2022] 3 CLJ 764, at paras. [66] to [68]:

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*[66] Both learned counsel for the Plaintiff and Defendant did not notice that the learned SCJ (Sessions Court Judge) had simultaneously dismissed and struck out This Action under O. 18 r. 19(1) RC* – please refer to SC's (Sessions Court's) Order.

*[67] Before I gave my oral decision of This Appeal, I inquired from learned counsel for the Plaintiff and Defendant on whether the learned SCJ could simultaneously dismiss and strike out This Action pursuant to O. 18 r. 19(1) RC. In accordance with the second rule of natural justice, I then gave both parties in This Appeal a right to submit on the matter raised by me – please refer to Tan Kang Hai v. Slimming Sanctuary Sdn Bhd [2016] 5 MLRH 651, at [11(2)]. I am not able to find a previous case from Malaysia, UK and Singapore on this question.*

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*[68] Learned counsel for the Plaintiff and Defendant stated that SC could not simultaneously dismiss and strike out This Action under O. 18 r. 19(1) RC. I agree. The court has the following five discretionary powers pursuant to O. 18 r. 19(1) RC:*

*(1) the court may strike out a pleading, endorsement on a pleading, an action or counterclaim;*

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*(2) the court may allow a party to amend a pleading, endorsement on a pleading, action or counterclaim;*

*(3) the court may stay an action or counterclaim;*

*(4) the court may dismiss an action or counterclaim; or*

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*(5) the court may enter a judgment in an action or counterclaim.*

*I am of the view that the court cannot simultaneously dismiss and strike out an action or counterclaim under O. 18 r. 19(1) RC. …* (emphasis added)

**[17]** As explained in *Yap Chee Keong Holdings*, the court has a discretionary power to dismiss or strike out this suit under O. 18 r. 19(1) RC. The court cannot however simultaneously dismiss and strike out this suit pursuant to O. 18 r. 19(1) RC. I will explain in para. 36 below that if the court is satisfied

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that an application has fulfilled any one of the sub-paragraphs in O. 18 r. 19(1)(a) to (d) RC, as a general rule, the court should exercise its discretion to strike out and not dismiss the action, counterclaim or originating summons (OS) in question.

**Can Plaintiff Rely On O. 92 r. 4 RC, Court's Inherent Jurisdiction And/Or Inherent Power To Strike Out This Suit?**

**[18]** Order 92 r. 4 RC states as follows:

> *Inherent powers of the Court*
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> *O. 92 r. 4 For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.* (emphasis added)

**[19]** It is decided in *Koh Tat Haur & Anor v. Brecon Synergy Sdn Bhd* [2022] 1 LNS 2648; [2022] AMEJ 1539, at para. [15]:

> *[15] Malaysian courts have struck out pleadings and OS under O. 92 r. 4 RC, the court's inherent jurisdiction and/or inherent power on the ground that the pleadings and OS constituted abuses of court process. With the greatest respect, I am of the view that in striking out applications filed pursuant to O. 18 r. 19(1)(a) to (d) RC, the court cannot rely on O. 92 r. 4 RC, the court's inherent jurisdiction and/or inherent power. My reasons are as follows:*
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> *(1) the Rules Committee has expressly enumerated the grounds for striking out in O. 18 r. 19(1)(a) to (d) RC. When O. 18 r. 19(1)(a) to (d) RC have explicitly listed the grounds for the exercise of the court's striking out powers, according to the the maxim of construction, expressio unius est exclusio alterius, the express mention of certain matters, implies the exclusion of all matters which have not been mentioned. This maxim of interpretation has been applied in the Federal Court's judgment delivered by Nik Hashim FCJ in Jamaluddin bin Mohd Radzi & Ors v. Sivakumar a/l Varatharaju Naidu (claimed as Yang Dipertua Dewan Negeri Perak Darul Ridzuan), Election Commission, intervener [2009] 4 MLJ 593, at 605-606; and*
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> *(2) O. 18 r. 19(1)(d) RC has specifically provided for "abuse of court process" as a ground for the exercise of the court's striking out power. The following two decisions of our apex courts have decided that if there is an express provision of written law which is applicable to a particular matter, the court should apply the specific provision of written law to the matter without resorting to O. 92 r. 4 RC, the court's inherent jurisdiction and/or inherent power:*
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> *(a) the Supreme Court's judgment delivered by Syed Agil Barakbah SCJ in Permodalan MBF Sdn Bhd v. Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors [1988] 1 MLJ 178, at 181; and*
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> *(b) the judgment of Zulkefli Ahmad Makinudin FCJ (as he then was) in the Federal Court case of Majlis Agama Islam Selangor v. Bong Boon Chuen [2009] 6 MLJ 307, at 320.* (emphasis added)

**[20]** Premised on *Koh Tat Haur*, in deciding encl. 9, the court cannot invoke O. 92 r. 4 RC, the court's inherent jurisdiction and/or inherent power.

**Whether Sub-para. (1)(a) Applies In This Case**

**[21]** I have decided in *Novaviro Technology Sdn Bhd v. QL Plantation Sdn Bhd & Anor; Watermech Engineering Sdn Bhd (Third Party)* [2018] 7 CLJ 119; [2018] 11 MLJ 392, at para. [25], as follows:

> [25] *To decide Enc. 5 under O 18 r 19(1)(a) RC [Paragraph (a)]:*
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> *(1) according to O. 18 r. 19(2) RC, the Court cannot consider affidavit evidence – please see the Court of Appeal's judgment delivered by Ramly Ali JCA (as he then was) in See Thong v. Saw Beng Chong [2013] 3 MLJ 235, at paragraphs 9 and 10; and*
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> *(2) the court will assume that the contents of the SOC are true – please see the Court of Appeal's judgment given by Mahadev Shankar JCA in Tuan Haji Ishak bin Ismail v. Leong Hup Holdings Bhd & other appeals [1996] 1 MLJ 661, at 679.* (emphasis added)

**[22]** In deciding encl. 9 under sub-para. (1)(a):

(i) by reason of O. 18 r. 19(2) RC, I cannot take into account affidavit evidence; and

(ii) this court has to assume the contents of the SOC to be true – please refer to the Court of Appeal's judgment delivered by Mahadev Shankar JCA in *Tuan Hj Ishak Ismail v. Leong Hup Holdings Bhd & Other Appeals* [1997] 1 CLJ 463; [1996] 1 MLJ 661, at 679.

**[23]** In the SOC, the plaintiff has expressly pleaded a cause of action against the defendant based on the tort of negligence. Accordingly, I am constrained to dismiss encl. 9 based on sub-para. (1)(a).

**Had SOC Scandalised Defendant Under Sub-para. (1)(b)?**

**[24]** In the High Court case *Technointan Holding Sdn Bhd v. Tetuan Tan Kim Siong & Teh Hong Jet* [2006] 7 CLJ 541, at para. [28], Low Hop Bing J (as he then was) has explained that the contents of a pleading are scandalous under sub-para. (1)(b) when such contents are "wholly unnecessary or irrelevant".

**[25]** I have perused the SOC. I am of the view that the contents of the SOC are not "wholly unnecessary or irrelevant" as explained in *Technointan Holding*. As such, the SOC did not scandalise the defendant under sub-para. (1)(b).

**[26]** Even if it is assumed that the contents of the SOC have scandalised the defendant as understood in sub-para. (1)(b), this court will not exercise its discretion to strike out this suit because the SOC has pleaded a cause of action based on the tort of negligence against the defendant – please refer to *Novaviro Technology*, at [30].

**Whether Alleged Duty Of Care (CBP Walls) Existed**

**[27]** It is not disputed that the plaintiff has to prove the following three elements of a tort of negligence against the defendant:

(i) the existence of the alleged duty of care (CBP Walls);

(ii) the defendant had breached the alleged duty of care (CBP Walls) (alleged defendant's breach (duty of care)); and

(iii) the alleged defendant's breach (duty of care) had caused the damage (CBP Walls).

**[28]** In *De Tebrau Makmur Sdn Bhd & Anor v. Bank Kerjasama Rakyat Malaysia Bhd* [2017] 1 LNS 252; [2017] MLJU 201, at [50], I have followed the judgment of Zainun Ali FCJ in the Federal Court case of *Lok Kok Beng & Anor v. Loh Chiak Eong & Anor* [2015] 7 CLJ 1008 as follows:

> *[50] My understanding of Lok Kok Beng is as follows:*
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> …
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> *(2) in deciding whether a party (X) owes a duty of care to another party (Y), the Court shall consider the following:*
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> *(a) whether there is "sufficient legal proximity" between X and Y. It is to be noted that Courts have also applied the test of whether it is reasonably foreseeable that Y will suffer loss or damage arising from X's misstatement. In this respect, the following considerations are relevant:*
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> *(i) the nature of relationship between X and Y;*
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> *(ii) whether X has voluntarily assumed responsibility to Y regarding X's misstatement;*
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> *(iii) whether Y has relied on X's misstatement;*
>
> *(iv) whether there is physical proximity;*
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> *(v) whether there is circumstantial proximity; and*
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> *(vi) whether there is causal proximity;*
>
> *(b) if there is "sufficient legal proximity" between X and Y, X owes a prima facie duty of care to Y. The next question is whether X's prima facie duty of care is negated by policy consideration. The following matters are pertinent:*

*(i) the factual matrix of the case;*

*(ii) whether there is a contract between X and Y; and*

*(iii) the relative bargaining positions of X and Y; …*

(emphasis added)

**[29]** In *Corsa Tech Sdn Bhd v. YTB Impression Sdn Bhd & Ors* [2021] 1 LNS 2345; [2021] MLJU 2210, I have decided that for the purpose of the tort of negligence, a construction project's architect and quantity surveyor owe no duty of care to the main contractor of the project (High Court's judgment (No Duty of Care Owed by Project Consultants to Main Contractor)). I have given the following reasons for this decision in *Corsa Tech*, at paras. [34] to [37] and [39] to [43]:

*[34] Firstly, employers of construction projects (Employers) and consultants, (eg. architects, QS's and engineers (Consultants)) have the freedom to enter into contracts with the Employers (Contracts (Employer-Consultant)).*

*[35] Secondly, upon the conclusion of Contracts (Employer-Consultant), Consultants owe contractual duties (and perhaps a duty of care too) to Employers regarding the Consultants' work in the project (Consultants' Duties (Employer)).*

*[36] The question that arises in this case is whether Consultants owe a duty of care to a project's main contractors and sub-contractors (Contractors) regarding works in the projects (Consultants' Duties (Contractors)).*

*[37] Before our Federal Court's decision in Lok Kok Beng & Anor v. Loh Chiak Eong & Anor [2015] 7 CLJ 1008, there are conflicting views regarding the existence of Consultants' Duties (Contractors) as follows:*

*(1) the following cases have decided that Consultants do not owe duties of care to Contractors:*

*(a) the judgments of Purchas, Ralph Gibson and Russell LJJ in United Kingdom's (UK) Court of Appeal case of Pacific Associates Inc & Anor v. Baxter & Ors [1989] 2 All ER 159, at 179-180, 185-187 and 192; and*

*(b) the decision of Chan Sek Keong CJ in Singapore's Court of Appeal in Spandeck Engineering (S) Pte Ltd v. Defence Science & Technology Agency [2007] 4 SLR 100, at [108], [109], [114] and [116]; and*

*(2) the existence of Consultants' Duties (Contractors) has been recognised by Lord Salmon in the House of Lords in Arenson v. Casson Beckman Rutley & Co [1977] AC 405, at 438, as follows:*

> Since the principle promulgated by Buckley LJ upon which he attempted to justify the old decisions had been completely rejected by your Lordships' House in *Sutcliffe v. Thackrah* [1974] AC 727, it was of necessity abandoned on the hearing of this appeal and a new ground had to be improvised for supporting the Court of Appeal's decision that public policy demanded

that so called quasi-arbitrators in the position of the respondents should enjoy immunity against being sued for damages caused by their own negligence. It was accordingly argued that without such immunity it would be very difficult, if not impossible, to persuade accountants to make valuations in circumstances such as the present, and that thus, contrary to the public interest, the commercial community would be deprived of a very valuable service. *The suggested reason for this supposed reluctance to make such valuations was that accountants would not accept the risk, as counsel put it, of being "shot at from both sides." It was one thing for an expert to express his opinion on value to a client who was a buyer or a seller but quite another for him to express his opinion on value in circumstances such as the present. In the one case, he was risking being sued for negligence only by his client; in the other, either the buyer or the seller might be dissatisfied with the valuation, and the expert would therefore be exposing himself to the wholly unacceptable dual risk of being sued by both. In spite of the remarkable skill with which this argument was developed, I cannot accept it. Were it sound, it would be just as relevant in Sutcliffe v. Thackrah as in the present case. The architect owed a duty to his client, the building owner, arising out of the contract between them to use reasonable care in issuing his certificates. He also, however, owed a similar duty of care to the contractor arising out of their proximity: see the Hedley Byrne case. In Sutcliffe v. Thackrah the architect negligently certified that more money was due than was in fact due; and he was successfully sued for the damage which this had caused his client. He might, however, have negligently certified less money was payable than was in fact due and thereby starved the contractor of money. In a trade in which cash flow is especially important, this might have caused the contractor serious damage for which the architect could have been successfully sued. He was thus exposed to the dual risk of being sued in negligence but this House unanimously held that he enjoyed no immunity from suit.*

*The above dicta by Lord Salmon in Arenson was purely obiter because the material facts of that case concerned a suit by a plaintiff against, among others, auditors who had been appointed to value shares of a company. No issue regarding the existence of Consultants' Duties (Contractors) arose in Arenson.*

*I have not overlooked the judgment of the House of Lords in Sutcliffe v. Thackrah [1974] AC 727. In Sutcliffe, the plaintiff had sued his architect for negligently over-certifying works performed by the contractor (to build the plaintiff's house). Sutcliffe did not decide that an architect owes a duty of care to a contractor.*

…

*[39] As a matter of stare decisis, I am bound by Lok Kok Beng. Premised on Lok Kok Beng, I am of the following view:*

*(1) the 2nd and 3rd Defendants had not voluntarily assumed any responsibility to the Plaintiff regarding the Works;*

*(2) the 2nd and 3rd Defendants owed prima facie Duties (Plaintiff) because:*

*(a) there was "sufficient legal proximity" between the Plaintiff on the one hand and 2nd and 3rd Defendants on the other hand in the sense that it was reasonably foreseeable that the Plaintiff would suffer loss or damage arising from act, omission and/or delay by:*

*(i) the 2nd Defendant with regard to the issuance of ICP's and CNC; and*

*(ii) the 3rd Defendant's valuation of PC's and VO's; and*

*(b) there existed in this case:*

*(i) physical proximity;*

*(ii) circumstantial proximity; and*

*(iii) causal proximity*

*regarding the Works between the Plaintiff on the one part and 2nd and 3rd Defendants on the other part; and*

*(3) the existence of prima facie Duties (Plaintiff) is negated by the following policy considerations:*

*(a) the 2nd and 3rd Defendants were appointed by the 1st Defendant (not the Plaintiff) for the Project. Accordingly, the 2nd and 3rd Defendants owed duties to the 1st Defendant regarding the Works (Duties (1st Defendant)).*

*If I had imposed Duties (Plaintiff) and in the event of a conflict between:*

*(i) Duties (Plaintiff); and*

*(ii) Duties (1st Defendant) (Conflict of Duties),*

*the imposition of Duties (Plaintiff):*

*(ai) may undermine Duties (1st Defendant);*

*(aii) may adversely affect the independence of the 2nd and 3rd Defendants in the performance of their Duties (1st Defendant);*

*(aiii) may cause the 2nd and 3rd Defendants to be on the horns of a dilemma – should the 2nd and 3rd Defendants comply with Duties (Plaintiff) or Duties (1st Defendant)? Worse still, when a Conflict of Duties arose, the 2nd and 3rd Defendants could be liable simultaneously to both the Plaintiff and 1st Defendant for the same aspect of the Works. Such an outcome is not just to the 2nd and 3rd Defendants; and*

*(aiv) may hinder, if not jeopardise, the smooth running and success of the project in question. This is unjust to Employers and does not augur well for the construction industry as a whole; and*

*(b) if this court does not recognise the existence of Duties (Plaintiff), there is no injustice to the Plaintiff because:*

*(i) the Plaintiff had the freedom to enter into the Agreement with the 1st Defendant. The Plaintiff also had actual knowledge of the existence of Duties (1st Defendant). Yet, the Plaintiff concluded the Agreement with the 1st Defendant; and*

*(ii) the Plaintiff had a valid cause of action against the 1st Defendant based on the Agreement. Any loss or damage suffered by the Plaintiff due to the 1st Defendant's breach of the Agreement could and should be only recovered from the 1st Defendant (not from the 2nd and 3rd Defendants).*

*[40] I acknowledge that the tort of negligence may be developed in an incremental manner based on the particular facts of each case (Incremental Approach). The Incremental Approach has been explained in Lok Kok Beng, at [68], as follows:*

> *[68] The test to determine the imposition of a duty of care was a two-stage test comprising first, proximity and, second, policy considerations, which were together preceded by the threshold question of factual foreseeability. It was held that a prima facie duty of care arises by satisfying the preliminary question of factual foreseeability and the first stage of the legal proximity test. Policy considerations should then be applied to the factual matrix to determine whether or not to negate this duty. The two-stage test is to be applied incrementally with reference to the facts of decided cases.*

*As explained in the above paragraphs 38 and 39, I have decided not to adopt the Incremental Approach in this case so as to impose Duties (Plaintiff) on the 2nd and 3rd Defendants. Having said that, I do not exclude the possibility that there may be an appropriate case in the future where policy considerations do not militate against the imposition of Consultants' Duties (Contractors).*

*[41] In the High Court case of L3 Architects Sdn Bhd v. PCP Construction Sdn Bhd [2019] 1 LNS 1321, at [1], [87] and [88], Aliza Sulaiman JC (as she then was) decided that a consultant architect appointed by an employer in a construction project did not owe a duty of care to the main contractor to ensure the validity and accuracy of the payment certificates issued by the architect.*

*[42] In view of Lok Kok Beng and the reasons explained in the above paragraphs 38 to 41, I have no hesitation to dismiss This Appeal against the 2nd and 3rd Defendants on the ground that the 2nd and 3rd Defendants owed no duty of care to the Plaintiff in respect of the Works.* (emphasis added)

In *Corsa Tech*, the main contractor did not file any appeal to the Court of Appeal against the High Court's judgment (No Duty of Care Owed by Project Consultants to Main Contractor). The employer of the project in *Corsa Tech* had initially appealed to the Court of Appeal against parts of the High Court's decision other than the High Court's judgment (No Duty of Care Owed by Project Consultants to Main Contractor) (employer's appeal (*Corsa Tech*)). However, the employer's appeal (*Corsa Tech*) was subsequently discontinued by the employer.

Up to the date of this written judgment, I am not aware of any judgment of the Federal Court or Court of Appeal which has overruled the High Court's judgment (No Duty of Care Owed by Project Consultants to Main

Contractor). Nor am I aware of any High Court's decision which has departed from the High Court's judgment (No Duty of Care Owed by Project Consultants to Main Contractor).

**[30]** I am of the following view:

(i) a main contractor of a construction project (main contractor) owes contractual duties and a duty of care (main contractor's duties (employer)) to the employer of the project (employer);

(ii) consultants of a project (project consultants) have been appointed by the employer and owe contractual duties and a duty of care to the employer (project consultants' duties (employer));

(iii) a sub-contractor of a project (sub-contractor) owes contractual duties and a duty of care (sub-contractor's duties (main contractor)) to the main contractor (who has appointed the sub-contractor);

(iv) as there is no contract between the main contractor and project consultants, project consultants owe no contractual duty to the main contractor;

(v) premised on *Corsa Tech*, project consultants owe no duty of care to the main contractor and sub-contractors (No Duty of Care Owed by Project Consultants (Main Contractor/Sub-Contractors));

(vi) a consultant appointed by the sub-contractor (sub-contractor's Consultant) owes contractual duties and a duty of care to the sub-contractor (duties of sub-contractor's consultant (sub-contractor)); and

(vii) a sub-contractor's consultant owes no duty of care to the main contractor. This decision is premised on the following reasons:

(a) based on *Lok Kok Beng*, there is no "sufficient legal proximity" between the main contractor and sub-contractor's consultant because:

(1) it is reasonably foreseeable that the main contractor will suffer loss and/or damage due to the negligent act(s) and/or omission of the sub-contractor; and

(2) it is not reasonably foreseeable that the main contractor will suffer loss and/or damage due to the negligent act(s) and/or omission of the sub-contractor's consultant;

(3) the sub-contractor's consultant has not voluntarily assumed any responsibility to the main contractor;

(4) by virtue of the contract between the main contractor and sub-contractor, the main contractor relies on the sub-contractor and not on the sub-contractor's consultant; and

(5) there is physical proximity, circumstantial proximity and causal proximity between the main contractor and sub-contractor. There is however no physical proximity, circumstantial proximity and causal proximity between the main contractor and sub-contractor's consultant;

(b) even if it is assumed that there is "sufficient legal proximity" between the main contractor and sub-contractor's consultant, namely, the sub-contractor's consultant owes a *prima facie* duty of care to the main contractor (*prima facie* duty of care of sub-contractor's consultant (main contractor)), this *prima facie* duty of care of sub-contractor's consultant (main contractor) is negated by the following policy considerations:

(1) the court's recognition of a duty of care owed by a sub-contractor's consultant to the main contractor (duty of care of sub-contractor's consultant (main contractor)) may open the floodgates of litigation by main contractors against sub-contractor's consultants (main contractors' suits (sub-contractor's consultants)). Limited judicial resources should not be needlessly expended to try main contractors' suits (sub-contractor's consultants);

(2) it is not in the public interest for a main contractor to commence a main contractor's suit (sub-contractor's consultant) when the main contractor can institute a suit or arbitration (whichever is applicable) against the sub-contractor regarding breach(es) of the sub-contractor's duties (main contractor) (main contractor's suit/arbitration (sub-contractor));

(3) it does not serve the interest of the main contractor to file both the main contractor's suit (sub-contractor's consultant) and main contractor's suit/arbitration (sub-contractor). This is because firstly, the main contractor cannot have an unjustifiable windfall of a double recovery of damages against both the sub-contractor and sub-contractor's consultant. As decided in *Motordata Research Consortium Sdn Bhd v. Ahmad Shahril Abdullah & Ors* [2017] 1 LNS 1142; [2017] 7 AMR 560, at para. [75(2)], when compensatory damages are assessed by the court, the court must ensure that a plaintiff is not over-compensated. Furthermore, the main contractor has to expend much time, effort and costs to prosecute both the main contractor's suit (sub-contractor's consultant) and main contractor's suit/arbitration (sub-contractor);

(4) in view of the main contractor's duties (employer), project consultants' duties (employer), sub-contractor's duties (main contractor) and duties of sub-contractor's consultant

(sub-contractor) (please refer to the above sub-paras. (1) to (3) and (6)), there is a "normal chain of liability" as explained by Dillon LJ in United Kingdom's (UK) Court of Appeal in *Simaan General Contracting Co v. Pilkington Ltd (No 2)* [1988] 1 QB 758, at pp. 785 to 786, as follows:

> *But in the present case I can see nothing whatever to justify a finding that the defendants had voluntarily assumed a direct responsibility to the plaintiffs for the colour and quality of the glass panels. On the contrary, all the indications are the other way and show that a chain of contractual relationships was deliberately arranged the way it was without any direct relationship between the plaintiffs and the defendants.*
>
> …
>
> *It might at first glance seem reasonable that, if the plaintiffs have a right of action in contract against Feal and Feal has in respect of the same general factual matters a claim in contract – albeit a different contract – against the defendants, the plaintiffs should be allowed a direct claim against the defendants. But in truth to allow the plaintiffs a direct claim against the defendants where there is no contract between them would give rise to formidable difficulties.*
>
> *If the plaintiffs have a direct claim against the defendants so equally or a fortiori has the Sheikh. Feal has its claim in contract also. All three claims should be raised in separate proceedings, whether by way of arbitration or litigation, and possibly in separate jurisdictions. The difficulties of awarding damages to any one claimant would be formidable, in view of the differing amounts of retentions by the Sheikh against the plaintiffs and by the plaintiffs against Feal and other possibilities of set off, and in view, even more, of the fact that none of the parties has yet actually incurred the major cost of replacing the defendants' (assumedly) defective glass panels with new panels of the correct colour. It would not be practicable, in my view, for the court to award damages against the defendants in a global sum for all possible claimants and for the court subsequently to apportion that fund between all claimants and administer it accordingly.*
>
> *Moreover, if in principle it were to be established in this case that a main contractor or an owner has a direct claim in tort against the nominated supplier to a sub-contractor for economic loss occasioned by defects in the quality of the goods supplied, the formidable question would arise, in future cases if not in this case, as to how far exempting clauses in the contract between the nominated supplier and the sub-contractor were to be imported into the supposed duty in tort owed by the supplier to those*

*higher up the chain. Such difficulties were dismissed by Lord Brandon in Leigh and Sillavan Ltd. v. Aliakmon Shipping Co. Ltd. [1986] AC 785, 817-819,* and provided, as I read his speech, part of his reasoning for maintaining the established principle which I have set out at the beginning of his judgment.

*If, by contrast, the court does not extend - and in my judgment it would be an extension – the principle of the Hedley Byrne case [1964] AC 465 to cover a direct claim by the plaintiffs against the defendants, no party will be left without a remedy, by English law at any rate, which is the only system of law we have been asked to consider. There will be the "normal chain of liability," as Lord Pearce called it in Young & Marten Ltd. v. McManus Childs Ltd. [1969] 1 AC 454, 470, in that the Sheikh can sue the plaintiffs on the main building contract, the plaintiffs can sue Feal on the sub-contract and Feal can sue the defendants. Each liability would be determined in the light of such exemptions as applied contractually at that stage. There is thus no warrant for extending the law of negligence to impose direct liability on the defendants in favour of the plaintiffs.*
(emphasis added)

The imposition of a duty of care of sub-contractor's consultant (main contractor) is not only contrary to the "normal chain of liability" (as explained in *Simaan General Contracting Co*) but will also cause uncertainty in the construction industry. I rely on the following judgment of Susan Glazebrook J (as she then was) in New Zealand's Court of Appeal case of *Rolls-Royce New Zealand Ltd v. Carter Holt Harvey Ltd* [2005] 1 NZLR 324, at paras. [117], [118] and [123]:

***Policy considerations***

*[117] There are a number of policy considerations pointing away from a duty of care being imposed in this case. Some have already been discussed above, including the difficulty, in cases where there are detailed contractual specifications for specialised plant, of setting quality standards that do not relate specifically to those contractual specifications.*

*[118] The main policy factor militating against a duty of care is the need for commercial certainty. Commercial parties are normally entitled to expect that the risk allocation they have negotiated (and paid for) will not be disturbed by the Courts. It is also to be expected that commercial parties are capable of looking after their own interests, including, especially in an industry where insolvency is a major risk, the risk of insolvency of an intermediate party. …*

…

*[123] Policy factors also point strongly against there being a duty of care in this case. These are sophisticated commercial parties capable of looking after their own interests. The Courts have no need to interfere in bargains they have freely arrived at.* (emphasis added)

(5) if the court recognises a duty of care of sub-contractor's consultant (main contractor), a conflict between the duties of sub-contractor's consultant (sub-contractor) and duty of care of sub-contractor's consultant (main contractor) (conflict of duties (sub-contractor's consultant) may arise.

When a conflict of duties (sub-contractor's consultant) arises:

(i) the sub-contractor's consultant is placed in a dilemma – should the sub-contractor's consultant comply with the duties of sub-contractor's consultant (sub-contractor) or the duty of care of sub-contractor's consultant (main contractor)?; and

(ii) if the sub-contractor's consultant complies with the duty of care of sub-contractor's consultant (main contractor), this will undermine the duties of sub-contractor's consultant (sub-contractor); and

(6) an injustice may be caused to the sub-contractor's consultant by the imposition of a duty of care of sub-contractor's consultant (main contractor). This is because the sub-contractor's consultant may be liable simultaneously to both the main contractor and sub-contractor for the same construction work and/or consultancy service; and

(c) as explained in *Corsa Tech*, a project consultant owes no duty of care to the main contractor. Hence, it will be illogical, if not ludicrous, for sub-contractor's consultants to owe a duty of care to main contractors when no such duty of care is owed by project consultants to main contractors.

**[31]** I have no hesitation to accept the submission by the defendant's learned counsel that the defendant did not owe a duty of care to the plaintiff with regard to the defendant's designs (CBP Walls) and damage (CBP Walls). My reasons are as follows:

(i) as decided in *Lok Kok Beng*, there is no "sufficient legal proximity" between the plaintiff (as the project's main contractor and SO) and defendant because:

(a) it is not reasonably foreseeable that the plaintiff would suffer the damage (CBP Walls) due to the defendant's designs (CBP Walls). On the contrary, it is reasonably foreseeable that the damage (CBP

Walls) would befall the plaintiff due to the negligence on the part of Biaxis who was appointed by the plaintiff to design, execute and complete the CBP Walls;

(b) the defendant had not voluntarily assumed any responsibility to the plaintiff in this case;

(c) with regard to the design, execution and completion of the CBP Walls, the plaintiff had relied on Biaxis and not on the defendant; and

(d) there was no physical proximity, circumstantial proximity and causal proximity between the plaintiff and defendant in respect of the design, execution and completion of the CBP Walls. Instead, there was physical proximity, circumstantial proximity and causal proximity between the plaintiff and Biaxis regarding the design, execution and completion of the CBP Walls;

(ii) as an alternative, if it is assumed that there was "sufficient legal proximity" between the plaintiff and defendant concerning the design, execution and completion of the CBP Walls, *ie*, the defendant owed a *prima facie* duty of care to the plaintiff, such a *prima facie* duty of care is negated by policy considerations as elucidated in the above sub-para. 30(7)(b); and

(iii) Minconsult owed no duty of care to the plaintiff with regard to the design, execution and completion of the CBP Walls – please refer to *Corsa Tech*. It is to be noted that the plaintiff has not filed any negligence suit against Minconsult in respect of the design, execution and completion of the CBP Walls. Accordingly, it is inapposite for the defendant to owe a duty of care to the plaintiff when Minconsult owed no such duty to the plaintiff.

**[32]** This court's decision in the above para. 31 does not cause any injustice to the plaintiff because the plaintiff may recover damages for the damage (CBP Walls) from Biaxis in the arbitration (plaintiff-Biaxis).

**[33]** For the sake of completeness:

(i) all the cases cited by the plaintiff's learned counsel do not support the existence of the alleged duty of care (CBP Walls) on the defendant's part;

(ii) in arriving at the decision in the above para. 31, I do not accept the contention of learned counsel for the defendant that the plaintiff might be unjustly enriched in the form of a double recovery of damages against both Biaxis and defendant. As explained in *Motordata Research Consortium*, the court must ensure that a plaintiff is not over-compensated in an assessment of damages; and

A (iii) the indemnity provisions (plaintiff-Biaxis) (relied on by the defendant's learned counsel) have no relevance in the court's determination of whether the defendant owed a duty of care to the plaintiff with regard to the defendant's designs (CBP Walls).

B **[34]** In view of the reasons stated in the above para. 31, it is plain and obvious that:

(i) this suit is frivolous and/or vexatious as understood in sub-para. (1)(b); and/or

(ii) this suit constitutes an abuse of court process within the meaning of C sub-para. (1)(d).

**Should Court Dismiss Or Strike Out This Suit?**

**[35]** I am not able to find any previous case which has been decided in Malaysia, Singapore and UK regarding the court's discretionary power under D O. 18 rr. 19(1) and (3) RC to strike out or dismiss an action, counterclaim and OS (action/counterclaim/OS).

**[36]** I am of the diffident view that if the court is satisfied regarding the application of any one of the subparagraphs in O. 18 r. 19(1)(a) to (d) RC, as a general rule, the court should only strike out and not dismiss the action/ E counterclaim/OS. This is because applications pursuant to O. 18 rr. 19(1) and (3) RC are decided summarily by the court based solely on whether any one of the sub-paragraphs in O. 18 r. 19(1)(a) to (d) RC has been fulfilled by the applicants. An action/counterclaim/OS should only be dismissed if the court has heard all the evidence which has been adduced by the parties in F the action/counterclaim/OS and a dismissal of action/counterclaim/OS is therefore justified by the evidence in question.

**Court's Decision**

**[37]** Premised on the above reasons, this suit is struck out with costs.

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